

STATE OF MICHIGAN
COURT OF APPEALS

ROXIE PHILLIPS,

Plaintiff-Appellant,

v

GEORGE DASS, M.D., and GEORGE DASS,
M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED

September 19, 2006

No. 267992

Genesee Circuit Court

LC No. 03-077564-NH

Before: Saad, P.J., and Jansen and White, JJ.

WHITE, J. (*dissenting*).

Because I agree with plaintiff that the circuit court abused its discretion in granting defendants' motion to allow a motion for summary disposition, almost one year after the dispositive motion cut-off deadline set in the court's scheduling order, and where defendants pleaded no good cause or excusable neglect, I respectfully dissent.

The circuit court's scheduling order of February 6, 2004 required that summary disposition motions be filed fifty-six days prior to alternative dispute resolution, which was held on October 27, 2004. The scheduling order referred to MCR 2.401. MCR 2.401(2) provides in pertinent part:

- (i) If a scheduling order is entered under this subrule in a manner that does not permit meaningful advance consultation with counsel, within 14 days after entry of a scheduling order, a party may file and serve a written request for amendment of the order detailing the reasons why the order should be amended.

MCR 2.108(E) provides:

(E) Extension of Time. A court may, with notice to the other parties who have appeared, extend the time for serving and filing a pleading or motion or the doing of another act, if the request is made before the expiration of the period originally prescribed. *After the expiration of the original period, the court may, on motion, permit a party to act if the failure to act was the result of excusable neglect.* However, if a rule governing a particular act limits the authority to extend the time, limitations must be observed [Emphasis added.]

Defendants did not file a motion for extension of time under MCR 2.108(E) of the dispositive motion cutoff date. Nor did defendants file a request to amend the scheduling order, see MCR 2.401(2), in such terms. Rather, defendants filed a motion to allow motion for summary disposition in June 2005, sixteen months after the circuit court issued its scheduling order that set the dispositive motion cutoff date before case evaluation (which was held in October 2004). Defendants' motion to allow motion for summary disposition nowhere argued or set forth facts which would support that their failure to timely bring a dispositive motion was the result of *excusable* neglect, as required by MCR 2.108(E). The only basis defendants articulated with specificity, see n 2 *infra*, in their motion to allow motion was *Apsey v Memorial Hospital*¹, a case that was vacated, and given prospective application only the day after defendants filed their motion to allow motion, i.e., well before defendants' motion to allow motion was heard.²

¹ *Apsey v Memorial Hospital*, published opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251110), which was vacated and given prospective application only on June 9, 2005, *Apsey v Memorial Hospital (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005).

² On June 8, 2005, defendants filed a Motion to Allow Motion for Summary Disposition. Defendants' motion to allow motion in its entirety stated:

1. This is a medical malpractice action filed by Plaintiff against the above named Defendants on or about October 20, 2003.
2. On February 6, 2004, the Court issued a Scheduling Order which set forth, among other things, that motions for summary disposition shall be filed and argued prior to alternative dispute resolution.
3. On October 27, 2004, Case Evaluation was held.
4. Trial has not yet been scheduled.
5. The Complaint filed by Plaintiff was accompanied by an Affidavit of Merit signed by an out-of-state expert, and the Affidavit lacked the required certification by the clerk of the court in the county in which the Affidavit was signed.
6. On April 19, 2005, the Michigan Court of Appeals issued a for-publication decision in *Apsey v. Memorial Hospital*, Court of Appeals Docket No. 251110, in which it was held that the out-of-state notary certification is a requirement in order to have a valid affidavit of merit.
7. The application of *Apsey*, *supra*, is applicable and dispositive of the present action, and serves as one basis for Defendant Dass' Motion for Summary Disposition, which is sought to be filed and heard.
8. The *Apsey* decision was not in existence at the time of deadline set by this Court for dispositive motions to be argued and heard.

(continued...)

Defendants subsequently abandoned their argument under *Apsey*. When actually filed, defendant's motion raised for the first time, relying on *Gladych v New Family Homes, Inc*, 468 Mich 594, 605; 664 NW2d 705 (2003), that because plaintiff did not place the summons and complaint in the hands of a process server when filed, the limitations period under MCL 600.5856 was not tolled. Unlike *Apsey*, which had been decided while the case was pending, *Gladych* had been decided before plaintiff's complaint was filed. No explanation has ever been provided for the failure to seek dismissal on this basis within the time provided by the scheduling order. No finding of excusable neglect, as required by the court rule, was ever made or supported.

My conclusion that the circuit court abused its discretion in granting defendants' motion to allow motion is in keeping with *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 349-350; 711 NW2d 801 (2005), in which the defendants asserted on appeal that the circuit court was required, as a matter of law, to consider their motions for summary disposition despite the fact

(...continued)

9. MCR 2.116(B)(2) provides that a motion for summary disposition may be filed at any time. MCR 2.116(D)(3) provides that the grounds for a motion under MCR 2.116(C)(10) may be raised at any time.

10. Allowing Defendant Dass' Motion for Summary Disposition will result in judicial economy and, if granted, is dispositive of this case and would avoid the need for a lengthy and expensive trial.

Defendants' brief in support of its motion, in its entirety, stated:

[Defendants] for their Motion to Allow Motion for Summary Disposition, rely on the following:

MCR 2.116(B)(2) which reads in pertinent part as follows:

A motion under this rule may be filed at any time consistent with subrule (D) and (G)(1), but the hearing on a motion brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim.

Further MCR 2.116(D)(3) provides a [sic] follows:

The grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time.

Defendants seek to file their motion based upon MCR 2.116(C)(8) and (10), a [sic] well as MCR 2.116(C)(7) which was raised in Defendants' first responsive pleadings.

WHEREFORE, Defendants Dass respectfully request this Honorable Court grant their motion and allow their Motion for Summary Disposition to be filed and heard.

that they were filed after the deadline set by the circuit court's scheduling order. This Court disagreed, holding that "the specific provision of MCR 2.401(B)(2)(a)(ii) controls over the more general rule that motions under MCR 2.116 may be filed at any time."

Under MCR 2.401(B)(2) a trial court "shall establish times for events the court deems appropriate, including . . . (ii) the amendment of pleadings, adding of parties, or filing of motions" Under this rule, the trial court has the discretion to decline to entertain motions beyond the stated deadline. [*People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997)]. While defendants concede that the trial court had this discretion, they nevertheless contend that the trial court was required, as a matter of law, to entertain their various motions despite the fact that they were all filed after the November 7, 2003, deadline set by the trial court. Defendants present several arguments in support of this contention.

Defendants first argue that the trial court was required to hear their December 30, 2003, motion for summary disposition because MCR 2.116(B)(2) provides that a motion for summary disposition may be filed by a party "at any time." We disagree that MCR 2.116(B)(2) deprives the trial court of discretion to set a limit on the time within which a motion under MCR 2.116 may be filed, as provided by MCR 2.401(B)(2).

MCR 2.116 sets forth the general rules governing motions for summary disposition. Although MCR 2.116(B)(2) states that motions under MCR 2.116, in general may be filed at any time, MCR 2.401(B)(2)(a)(ii) specifically grants the trial court the power to limit this period through a scheduling order when it "concludes that such an order would facilitate the progress of the case" Hence, these provisions appear to conflict. Under MCR 1.105, this Court must construe the rules "to secure the just, speedy, and economical determination of every action" As our Supreme Court has noted, MCR 2.401 implicitly permits trial courts to decline to entertain motions beyond the deadlines established in scheduling orders. *Grove, supra* at 469. Furthermore, the Court held that this construction promotes the efficient management of the trial court's docket and is consistent with the rule of construction stated under MCR 1.105. *Grove, supra* at 469 n 36, 470. Were we to construe MCR 2.116 in the way urged by defendants, we would effectively construe the reference to motions in MCR 2.401(B)(2)(a)(ii) out of existence, and, thereby, severely curtail the trial court's ability to manage its docket through the use of scheduling orders. Therefore, we decline to interpret MCR 2.116(B)(2) to limit the discretion of the trial court's ability to set deadlines through scheduling orders made pursuant to MCR 2.401(B). Instead, we hold that the specific provision of MCR 2.401(B)(2)(a)(ii) controls over the more general rule that motions under MCR 2.116 may be filed at any time. [*Kemerko Clawson, supra*, 269 Mich App at 349-351.]

I conclude that the grant of defendants' motion to allow motion was an abuse of discretion.

/s/ Helene N. White